DOUGLAS MARSHALL-STEELE Appellant, v. NANTICOKE MEMORIAL HOSPITAL, INC. AND UNEMPLOYMENT INSURANCE APPEAL BOARD Appellee

C.A. No. 98A-10-001

SUPERIOR COURT OF DELAWARE, SUSSEX

1999 Del. Super. LEXIS 137

April 6, 1999, Submitted
June 18, 1999, Decided

SUBSEQUENT HISTORY: [*1]

Released for Publication by the Court July 1, 1999.

PRIOR HISTORY:

Decision on Appellant's Appeal from Decision of the Unemployment Insurance Appeal Board.

DISPOSITION:

Remanded.

COUNSEL: Jeffrey K. Martin, Esquire, and Herbert G. Feuerhake, Esquire, Wilmington, Delaware, Attorneys for Appellant.

Vincent G. Robertson, Esquire, Georgetown, Delaware, Attorney for Appellee, Nanticoke Memorial Hospital, Inc.

JUDGES: T. Henley Graves, J.

OPINION BY: T. Henley Graves

OPINION:

MEMORANDUM OPINION

Graves, J.

This is an appeal from a decision of the Unemployment Insurance Appeal Board (the "Board") wherein the Board held that Appellant, Douglas Marshall-Steele was not entitled to unemployment benefits. For the reasons more particularly set forth below, the Court holds that the decision of the Board is void and this matter is remanded to the Board for proceedings consistent herewith.

Nature and Stage of Proceedings

Appellee, Nanticoke Memorial Hospital ("Employer"), terminated the employment of Appellant, Douglas Marshall-Steele ("Employee"), on March 9, 1998, because Employer determined that Employee had falsified hospital records of six patients under his care on the day of his termination. Employee filed for unemployment [*2] insurance benefits on March 10, 1998. The Claims Deputy denied Employee benefits on March 30, 1998.

Employee appealed this decision to an Appeals Referee on April 6, 1998. On May 6, 1998, a de novo hearing was held before an Appeals Referee. At the hearing before the Appeals Referee Employer was represented by a nonemployee, nonattorney representative named Paula Young ("Young"). Young was an employee of Employer's Unity. She is not an attorney. Employer's Unity is a company apparently in the business of representing other companies in Unemployment Insurance appeals. Employee objected to Employer's representation by Young on the grounds that Employer was a corporation and consequently was required to be represented by an attorney. Employee maintained that Young's representation of Employer constituted the unauthorized practice of law. The Appeals Referee overruled Employee's objection on this point and proceeded to hear the evidence in the case. The Appeals Referee issued a decision on May 27, 1998, affirming the decision of the Claims Deputy. The Appeals Referee determined that Employee was discharged for just cause and consequently ineligible for benefits.

Employee appealed [*3] the decision off the Appeals Referee to the Unemployment Insurance Appeal Board (the "Board") on May 31, 1998. At the Board hearing Employee argued that the decision of the Appeals Referee should be reversed because Employer was not represented by an attorney at the hearing. The parties presented brief oral argument regarding the merits of the decision of the Appeals Referee. The Board affirmed the decision of the Appeals Referee by a written decision dated September 25, 1998. The Board held that Employer was not required to be represented by an attorney before the Appeals Referee and affirmed the determination of the Appeals Referee that Employee was ineligible for benefits because he was terminated for just cause in connection with his work.

On October 5, 1998, Claimant appealed the decision of the Board to this Court. Employee requests that this Court reverse the decision of the Board and remand the case to the Board with instructions to award benefits to Employee in accordance with 19 Del. C. § 3314 et seq.

Statement of Facts

Employee was employed by Employer as a registered nurse from June 7, 1993, until March 9, 1998, when his employment was terminated for falsification [*4] of patient records. On March 9, 1998, Employee was working a 7:00 a.m. to 7:00 p.m. shift on the Progressive Care Unit ("PCU"), an "intensive care step down unit." At 9:30 a.m. a patient was transferred from the PCU to a medical-surgical unit ("MSU") within the hospital. At approximately 10:00 a.m., a MSU nurse noticed that the "nursing rounds" and "IV rounds" portion of the "24-Hour Flow Sheet" ("Flow Sheet") for the patient contained check-marks (" [checkmark] ") reflecting that the patient had been observed by a nurse every hour from 7:00 a.m. until 7:00 p.m. The nurse presented the patient's Flow Sheet to her supervisor. The supervisor investigated the matter and determined that Employee had "prechecked" the nursing rounds and IV rounds sections of the Flow Sheet of the transferred patient and that of five other patients assigned to Employee that day. Employer terminated Employee that day as a consequence of this practice. This practice will hereafter be referred to as "pre-charting."

A supervisor for Employer testified:

> I think the first thing that we had to decide was, was this in fact falsification of records. I think that was the biggest concern initially was how to [*5] interpret the practice. Um, and so when I, when I looked at the guidelines and you know very carefully read over them it pretty, it's pretty clear in that it says under nursing rounds it indicates that the nurse or nursing assistant has made a direct observation of the patient's current clinical status and environment. And that IV rounds indicate that the nurse had made a direct observation of the IV site, solution, and rate. So obviously, if this is at 12:30 in the afternoon and it's documented that it was done at 7 o'clock at night it's pretty much humanly impossible to have done those things at 7 pm, or 6 pm, or 3 pm, if it's only noon. And so that the determination of the fact that yes this is falsification it was not true at 12:30 or 1 o'clock in the afternoon that it has not been done at 7 o'clock that night. So that was the first piece. Once we determined the falsification portion then we looked to see well what is our recourse for action here. And the recourse for action when we looked at the disciplinary policy is that a person may in fact be terminated, may be terminated for falsification of records. The other thing we considered was the Nurse Practice Act. And the Nurse [*6] Practice Act clearly indicates that falsification of medical records is unprofessional conduct. I think the last thing that we had to consider was what is the past practice within the organization when people are known to have falsified records. And the past practice has been that people are terminated. And so it was with a good deal of care and consideration and concern that we finally made, came to that decision.

Witnesses testified at the hearing that nurses are instructed in the completion of the Flow Sheet and that Flow Sheet Guidelines are given to every nurse. Witnesses also testified that policy manuals are located on each floor which contain, among many things, the Employee Conduct and Discipline policy and the Flow Sheet Guidelines. The Employee Conduct and Discipline policy and the Flow Sheet Guidelines were admitted at the hearing.

Employee testified that he never received a copy of the February 1997 employee conduct and discipline portion of the Organization Policy and Procedures Manual. He testified that he never had time to read the manuals while working at the east work-station where the manual is located. The policy states that falsification of Hospital or patient [*7] records is an infraction which may result in immediate dismissal.

The Flow Sheet is a worksheet on which attending nurses are to document "patient assessment and care activities, evaluation of nursing interventions, problem outcomes and clinical changes." The worksheet has spaces for nurses to document a patient's vital signs, intake and output, cognitive and motor skills, etc. The Flow Sheet Guidelines state, "The 24-Hour Flow Sheet is a permanent part of the patient record...." The portions of the guidelines pertaining to nursing rounds and IV rounds state:

> A. Nursing Rounds - A " [checkmark] " will indicate the Nurse or Nursing Assistant has made a direct observation of the

> patient's current clinical status and environment.
> B. IV Rounds - A " [checkmark] " will indicate the Nurse has made a direct observation of the IV site, IV solution and rate...

Employee testified that he has seen the guidelines on Flow Sheet clipboards but that he was not aware that he ever personally received a copy. Employee further testified that he did not know pre-charting was improper or considered falsification of patient records. Employer presented testimony that pre-charting [*8] was not a common practice at the hospital. However, witnesses presented by Employee testified that the pre-charting of Flow Sheets prior to actually visiting with the patients was not uncommon.

The Appeals Referee's decision denying employee benefits stated:

> Willful or wanton conduct such as would constitute just cause for the claimant's discharge requires a showing that the claimant was conscious of his conduct and recklessly indifferent of its consequences. It need not imply bad motive or malice by the claimant. There can be no question that the claimant's act of charting ahead constituted falsification of patient records. When the claimant put the marks on the patient's chart, he was indicating that he had seen the patient at those times, therefore, the marks indicated something that was not true. Even though the marks may have indicated a truth by the end of the day, at the time the claimant made them, he falsified the patient's record.
>
> The testimony presented in this case leaves no question that the claimant was conscious of and intended to make the marks on the patient's chart. He also testified that a nurse is conscious that they are creating a permanent legal [*9] record. If the claimant was aware of creating that permanent legal record, then he should have been aware of the potential legal consequences to the employer because of his charting method. While the claimant may have never been specifically told not to chart ahead, his awareness of creating a permanent legal record should have told him that writing something on a chart that is not true at the time it is written constitutes falsification of patient records and could have potential legal consequences for the employer. This tribunal finds the claimant was recklessly indifferent to the consequences of his actions. The fact that other nurses may have done the same things does not justify the claimant's actions. Consequently, this tribunal concludes that the claimant's act of charting ahead constitutes willful and wanton misconduct sufficient to provide the employer with just cause for his discharge.

Employee argues that the decision of the Board should be reversed for the following reasons: 1) The Board erred as a matter of law when it held that Employer could be represented before the Appeals Referee by a nonemployee, nonlawyer representative; and 2) There was no substantial evidence [*10] from which the Unemployment Insurance Appeal Board could determine that Douglas Marshall-Steele was discharged from his work for just cause in connection with his work.

Employer argues that allowing Employer to be represented by a nonemployee, nonlawyer representative at the hearing before the Appeals Referee did not constitute error, but even if it did, it was harmless error. Employer maintains that Employee was discharged from his employment for just cause.

Discussion

A. Standard of Review

The scope and standard of review of a decision of the Unemployment Insurance Appeal Board is limited to a determination of whether there was substantial evidence sufficient to support its findings. Unemployment Ins. Appeal Bd. of Dep't of Labor v. Duncan, Del. Supr., 337 A.2d 308 (1975). If such evidence exists and the Board has made no error of law, its decision must be affirmed. Longobardi v. Unemployment Ins. Appeal Bd., Del. Super., 287 A.2d 690, 691 (1971), aff'd, Del. Supr., 293 A.2d 295 (1972).

"Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Oceanport Ind. v. Wilmington Stevedores, Del. Supr., [*11] 636 A.2d 892, 899 (1994); See also Battista v. Chrysler Corp., Del. Supr., 517 A.2d 295, 297 (1986), app. dism. Del. Supr., 515 A.2d 397 (1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. Johnson v. Chrysler Corp., 59 Del. 48, 213 A.2d 64, 66 (1965).

B. Discussion and Application of the Law

Did the Board err by holding that Employer could be represented by a nonemployee, nonattorney representative before the Appeals Referee?

Employee maintains that the Board erred as a matter of law in holding that Employer could be represented by a nonemployee, nonattorney representative at the hearing before the Appeals Referee. Employee argues that the case of Brainard v. Chrysler Corporation is inapposite because that case only stands for the proposition that a nonattorney employee of Employer may represent Employer at an administrative hearing. Brainard v. Chrysler Corporation, 1995 Del. Super. LEXIS 34, Del. Super., C.A. No. 94-A-08-020, Del Pesco, J. (Feb. 14, 1995) ("Brainard"). Employee argues that the situation presented in the case at bar is different from that in the Brainard case because the representative [*12] of Employer was not an employee of Employer, but rather an employee of another company retained by Employer to represent Employer in the capacity of legal counselor. Employee further argues that the allowance of the nonemployee, nonattorney representative was not harmless error and to hold such would be to violate the public policy in favor of protecting the public from incompetent practitioners. Citing Matter of Coleman, Employee states, "The appropriate remedy against a party represented by a nonattorney is to invalidate the actions of the nonattorney,..." See, Matter of Coleman, Del. Supr., 588 A.2d 1142 (1991) (A petition for writ of mandamus filed by nonattorney on behalf of a party was dismissed. Court held that the writ "manifestly fails on its face to invoke the jurisdiction of the Court...").

Employer maintains that Young was a duly authorized representative of Employer and under the holding of Brainard was permitted to appear on behalf of Employer at the hearing before the Appeals Referee. Employer argues that even if Young was not permitted to represent Employer before the Appeals Referee, the decision to permit the representation was harmless error.

In [*13] Brainard, the Superior Court held that a nonlawyer employee of an employer could represent the employer at the administrative level. The Court held:

> In the instant case, it was not error to allow the appellee, employer to be represented by a non-lawyer employee of the corporation, at the administrative level. The Delaware Unemployment Compensation Law is administered by the Delaware Department of Labor. The Department of Labor Regulation 20(4)(a) holds that' ... any corporation or association may be represented by an officer or by a duly authorized representative ...' 29 Del. C. § 10114 allows an agency to adopt its rules and regulations. 29 Del. C.§ 10161(b) holds that § 10114 is applicable to the Department of Labor. [emphasis added]

Brainard at 2.

Based on the facts of this case I decline to follow the Brainard decision. The admission of attorneys to practice and the exclusion of unauthorized persons from practice lie within the exclusive province of the Delaware Supreme Court. Delaware Optometric Corp. v. Sherwood, Del. Supr., 36 Del. Ch. 223, 128 A.2d 812 (1957). The statutory enactments authorizing the Supreme Court to establish [*14] and maintain the standards of the bar are merely the "legislative recognition of the inherent powers of this Court." To Re Member of Bar, Del. Supr., 257 A.2d 382, 383 (1969). Neither the Delaware Legislature nor an agency statutorily authorized by the Legislature have the authority to define the practice of law in this State, as that authority is exclusively within the province of this state's highest court. See, Delaware Optometric Corp., 128 A.2d at 816-17; In Re Member of Bar, 257 A.2d at 383. Again, the facts of the present case are that a nonemployee, nonattorney was permitted to represent a party in a legal proceeding.

The Delaware Supreme Court has ruled that, "while a natural person may represent himself or herself in court even though he or she may not be an attorney licensed to practice, a corporation, being an artificial entity can only act through its agents and, before a court only through an agent duty licensed to practice law." Transpolymer Industries, Inc., v. Chapel Main Corp., Del. Supr., 582 A.2d 936 (1990) (ORDER) [emphasis added]. The Delaware Supreme Court has not decided whether a corporation must be represented [*15] by an attorney before an administrative board. n1

> n1 The Supreme Court through the promulgation of Supreme Court Rule 57 does permit corporations to be represented by officers or employees of the corporation in the Justice of the Peace Court. The rule would not permit Young or Employer Unity to represent Employer before the J.P. Court because Employer Unity is neither an officer or employee of Employer.

However, courts in other jurisdictions have relied upon the exclusive power of the state's highest court to regulate the practice of law within the state to hold that the legislature has no authority to grant a nonattorney the right to practice law even if limited to practice before an administrative agency. See Perto v. Board of Review, Ill. App. Ct., Supr., 274 Ill. App. 3d 485, 654 N.E.2d 232, 238, 210 Ill. Dec. 933 (1995), citing, People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937) (Illinois Supreme Court held that a nonattorney, who held himself out as an agent who could handle worker's compensation claims for [*16] injured workers, could not appear before Industrial Commission because such activity was the unauthorized practice of law). See also Petition of Burson, Tenn. Supr., 909 S.W.2d 768 (1995) (holding that Supreme Court (of Tennessee) is only branch of (state) government that possesses inherent power to determine whether method so designated by the legislature permitted unauthorized practice of law; that rule controls despite fact that nonattorney agents are participating in administrative proceedings rather than court proceedings); Reed v. Labor and Indus. Relations Comm'n, Mo. Supr., 789 S.W.2d 19, 20 (1990), citing, In Re Thompson, Mo. Supr., 574 S.W.2d 365, 367 (1978).

The Delaware Supreme Court has sanctioned the following definition of the practice of law:

> In general, one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply the possession and use of legal knowledge and skill. The practice of law includes 'all advice to clients, and all actions taken for them in matters connected with the law' ... and the exercise of such professional skill certainly includes the pursuit, as an advocate for another, [*17] of a legal remedy within the jurisdiction of a quasi judicial tribunal.

Delaware State Bar Ass'n v. Alexander, Del. Supr., 386 A.2d 652, 661 (1978). Where an administrative tribunal is under a duty to consider evidence and apply law to facts as found, the tribunal is performing a quasi judicial function. Maryland-National Capital Park and Planning Comm'n v. Friendship Heights, Md. App., 57 Md. App. 69, 468 A.2d 1353 (1984).

Young cross-examined witnesses and presented argument at the hearing before the Appeals Referee. In doing so, Young clearly engaged in the practice of law. Since Young is not an attorney licensed by the Delaware Supreme Court to practice law in this State, she was engaged in the unauthorized practice of law. Because Young's representation of Employer constituted the unauthorized practice of law, the Board's allowance of such representation was legal error.

Employer maintains that even if the Board committed error by upholding its representation by Young, such error was harmless error not warranting reversal of the Board's decision. The Court disagrees. In Gibson v. North Delaware Realty Co. Stoneybrook Townhomes, 1996 Del. Super. LEXIS 529, Del. Supr., C.A. No. 95A-08-011, [*18] Herlihy, J. (Aug. 20, 1996) ("Gibson"), the Superior Court declared a judgment in favor of a corporation obtained in the Justice of the Peace Court void because the corporation was not represented by legal counsel or a representative qualified under Supreme Court Rule 57. Gibson at 7. The Gibson court noted, "Where a corporation has initiated legal proceedings and is represented at trial by an unqualified person, the overwhelming number of courts have determined that any judgment awarded the corporation is void." 1996 Del. Super. LEXIS 529, * 6. The Court noted that one of the reasons for such a holding is that "with the benefits of being a corporation must come the responsibilities to act through duly authorized agents." Id.

This Court shall follow the precedent established by the Gibson decision. The Board's decision in this matter is hereby declared void and this matter is remanded to the Board for proceedings consistent herewith. This decision shall not apply retroactively but shall only apply to proceedings before the Board filed after the date of this decision. See Gibson at 7-9. n2 IT IS SO ORDERED.

n2 While this Court's decision is not based upon the merits of the case, were it so based, the case would have been remanded back to the Board for additional findings of fact. Under the second-prong of the test outlined in Thornton v. UIAB, 1996 Del. Super. LEXIS 442, Del. Super., C.A. No. 96A-04-002, Ridgely, P.J. (October 1, 1996), the Court must determine whether the employee was apprised of the policy serving as the basis for his termination and if so, how was he made aware. The Board's decision does not satisfy this prong of the test because neither the Appeals Referee nor the Board made a factual finding as to whether Employee was apprised of or educated about the policy or policies prohibiting pre-charting. It is only obvious that pre-charting constitutes falsification of records if one is aware that the Flow Sheet Guidelines state that a checkmark indicates a direct observation of the patient. This may appear to be obvious but there is a gap in the factual findings of the Board which should be addressed one way or the other on remand.

[*19]

T. Henley Graves